

PERFORMANCE AGREEMENT

This Performance Agreement (the “Agreement”) is dated as of _____, 2015, by, between and among the **City of Lynchburg, Virginia** (the “City”), the **Lynchburg Economic Development Authority** (the “Authority”) and **Virginian Hotel, LLC** (the “Owner”).

RECITALS

- R1. The Owner has proposed the rehabilitation, renovation and development of the property known as the former Virginian Hotel located at 712 Church Street, Lynchburg, Virginia, for a hotel, restaurant, commercial, and conference facility with related amenities, site improvements, and public infrastructure (the “Project”).
- R2. The Owner intends to acquire the Property located at 712 Church Street, Lynchburg, Virginia (the “Property”), as part of the development of the Project.
- R3. The City and the Authority recognize that the development of the Project will require significant costs for rehabilitation, renovation, construction, remediation, site improvements, utility upgrades, street scape improvements, and other improvements.
- R4. The Owner has requested economic development grants and gap loan financing through the Authority to assist in financing the costs for the Project.
- R5. The City and the Authority wish the Project to proceed and have determined that the Project will promote economic development in the City and the region. The Project will provide additional tax revenues, additional employment opportunities and new amenities and will contribute to the continued vitality of downtown Lynchburg.
- R6. The City and the Authority recognize that the Property is historically significant in the context of Downtown Lynchburg. The parties recognize that historic, rehabilitation, and other tax credit financing arrangements are essential to finance the Project.
- R7. The Authority, based on the undertakings of the Owner, has determined to make the Authority Loan to the Owner in accordance with the terms and conditions of this Agreement.
- R8. The Authority, based on the undertakings of the Owner, has determined to make annual economic development grants (the “Grants”) to the Owner from funds provided for that purpose to the Authority by the City, in accordance with the terms of this Agreement.
- R9. The City, based on the undertakings of the Authority and the Owner, has determined to appropriate funds from the Tax Revenues generated by the Project to the Authority for the purpose of the Grants, in accordance with the terms of this Agreement.

R10. The parties wish to reduce their understanding to writing.

NOW, THEREFORE, the parties, in consideration of the promises and obligations contained herein, mutually agree as follows:

ARTICLE I INCORPORATION OF RECITALS

1.1 The recitals stated above shall be part of this Agreement.

ARTICLE II DEFINITIONS

The terms defined in this Article II shall for all purposes of this Agreement have the meanings specified unless the context expressly or by necessary implication otherwise requires:

2.1 **“Agreement”** means this Performance Agreement by, between and among the City, the Authority, and the Owner, as amended, supplemented, or modified from time to time, and all amendments.

2.2 **“Annual Net Positive Cash Flow”** means the positive difference between the Owner’s cash inflows and outflows in a calendar year. In this case, the annual net positive cash flow shall be determined after the payment of all required payments to tax credit partners, lender required replacement reserves, deferred developer fee allowed in the historic tax credit, all tax liabilities associated with the Project, and/or the syndication of any tax credits, and a preferred cumulative annual return to the Owner equal to four percent (4%) of the Project cost.

2.3 **“Appropriation”** means the appropriation by the City to the Authority each Fiscal Year pursuant to this Agreement in the amount of the New Tax Revenues, with any reconciliation adjustments, or any other amount.

2.4 **“Authority”** shall mean the Lynchburg Economic Development Authority.

2.5 **“Authority Deed of Trust”** means that certain deed of trust of even date with the Authority Loan in form and substance reasonably satisfactory to the Authority given to secure the payment of the Authority Loan. The Authority Deed of Trust shall be subordinate to the Conduit Loan Deed of Trust and any deed of trust providing primary construction financing or permanent financing for the Project.

2.6 **“Authority Loan”** means the Two Million Dollars (\$2,000,000) loan by the Authority to the Owner evidenced by the Authority Note and any renewals, modifications or extensions thereof.

2.7 **“Authority Note”** means the promissory note evidencing the Authority Loan, executed and delivered pursuant to this Agreement, and any and all renewals, modifications, and extensions thereof.

2.8 **“Bank Loan”** means the Three Million Dollar (\$3,000,000) loan between a bank and the Authority.

2.9 **“Bank Note”** means the promissory note evidencing the Bank Loan, and any and all renewals, modifications, and extensions thereof.

2.10 **“Closing Date”** shall mean the date of the Authority Note.

2.11 **“Conduit Loan”** means the Three Million Dollar (\$3,000,000) loan by the Authority to the Owner evidenced by the Conduit Note and funded by the proceeds of the Bank Loan, and any renewals, modifications, or extensions thereof.

2.12 **“Conduit Loan Deed of Trust”** means that certain deed of trust given to secure the payment of the Conduit Loan. The Conduit Loan Deed of Trust shall have priority over the Authority Loan Deed of Trust and shall be subordinate to any deed of trust providing primary construction financing or permanent financing for the Project.

2.13 **“Conduit Note”** means the promissory note evidencing the Conduit Loan, and any and all renewals, modifications, and extensions thereof.

2.14 **“City”** means the City of Lynchburg, Virginia.

2.15 **“Debt Service”** means the amount necessary to pay all amounts due, including principal and interest, on the Authority Loan and the Conduit Loan.

2.16 **“Fiscal Year”** means the financial reporting period from July 1 through June 30 of each year.

2.17 **“GenWorth Lot”** shall mean the parking lot adjacent to the Property located on 717 Main Street.

2.18 **“Grant”** shall mean the annual cash grant payment by the Authority to the Owner from funds provided for that purpose to the Authority by the City.

2.19 **“New Tax Revenues”** means all tax revenues and tax benefits the City receives from the Property or the Project, and any taxes generated by the Project, the Property or any business located on the Property, including revenues from real estate taxes, the City’s portion of general sales tax, business professional and occupational license tax, tangible personal property tax, meals and beverage tax, and lodging tax, and all other tax revenues or benefits realized by the City from the Property or the Project, to the extent that such tax revenues and benefits exceed \$100,000 in a Fiscal Year (or prorated for any period shorter than a Fiscal Year).

2.20 **“Owner”** means the Virginian Hotel, LLC.

2.21 **“Project”** means the rehabilitation, renovation, and development of the Property for a hotel, restaurant, commercial and conference facility with related amenities, site improvements and public infrastructure improvements.

2.22 **“Property”** means the land, buildings, structures, and improvements formerly known as the Virginian Hotel located at 712 Church Street, Lynchburg, Virginia, Tax Map No. 02434012.

2.23 **“Shortfall”** means the amount by which the cumulative Grants are less than the cumulative Debt Service, plus interest on said amount from the date it is paid to when it is reimbursed. Interest shall be the same rate charged on the Conduit Loan.

ARTICLE III THE AUTHORITY LOAN

3.1 **Amount.** The Authority agrees to lend the Owner the principal sum of Two Million Dollars (\$2,000,000), upon the terms and conditions set forth in this Agreement. The Owner agrees to accept the Authority Loan and agrees to comply with the terms and conditions of this Agreement.

3.2 **Disbursement.** The Authority will disburse the Authority Loan on a lump sum basis at the Closing Date.

3.3 **The Authority Note.** The Authority Loan shall be evidenced by the Authority Note in the amount of the Authority Loan, payable to the order of the Authority, in accordance with the terms and conditions set forth in this Agreement. The Authority Note shall be on the same terms and conditions and interest rate as the Bank Loan.

3.4 **Authority Deed of Trust.** The Authority shall receive the Authority Deed of Trust as collateral security for the Authority Loan. The Authority Deed of Trust shall be subordinate to the Conduit Loan Deed of Trust and subordinate to the primary construction and permanent financing for the Project.

3.5 **Pledge of Grants.** The Owner shall pledge the Grants as collateral security to pay the Debt Service.

3.6 **Closing Date.** The Closing Date for the Authority Loan shall be on a date mutually agreed upon by Owner and Authority, but in no case later than July 1, 2015.

3.7 **Additional Collateral.** At Closing the Authority shall receive a first lien deed of trust on a property in the City of Lynchburg with an assessed value not less than Three Hundred

Seventy Thousand Dollars (\$370,000), which deed of trust shall be released by the Authority upon issuance of a Certificate of Occupancy for the Project.

3.8 **Deliveries.** Prior to Closing on the Authority Loan, Owner shall show evidence of commitment for the primary financing for the Project and an agreement that identifies the hotel brand.

ARTICLE IV THE CONDUIT LOAN

4.1 **Bank Loan.** The Authority shall enter into a loan with a bank in the amount of Three Million Dollars (\$3,000,000) upon the terms and conditions agreed to between the Authority and the bank. The Owner shall arrange the Bank Loan, with the Authority's assistance.

4.2 **No Recourse.** The Bank Loan shall be without recourse to the Authority other than the pledge of the Appropriations, the Conduit Note and the Conduit Loan Deed of Trust.

4.3 **Conduit Loan.** The Authority agrees to lend the Owner the principal sum of Three Million Dollars (\$3,000,000) upon the terms and conditions set forth in this Agreement. The Conduit Loan shall be made on the same terms and conditions and interest rate as the Bank Loan. The Owner agrees to accept the Conduit Loan and agrees to comply with the terms and conditions of this Agreement. The Authority shall use the proceeds of the Bank Loan to fund the Conduit Loan.

4.4 **Disbursement.** The Authority shall disburse the proceeds of the Conduit Loan to the Owner on a lump sum basis at the Closing Date or as determined by the terms of the Conduit Loan.

4.5 **Conduit Note.** The Conduit Loan shall be evidenced by the Conduit Note in the amount of the Conduit Loan, payable to the order of the Authority, in accordance with the terms thereof.

4.6 **The Conduit Loan Deed of Trust.** The Authority and the Owner agree that the Authority shall receive the Conduit Deed of Trust as collateral security for the Conduit Loan. The Conduit Deed of Trust shall be subordinate to the primary construction and permanent financing for the Project and shall have priority over the Authority Deed of Trust.

4.7 **Pledge of Grants.** The Owner shall pledge the Grants as collateral security to pay the Debt Service.

ARTICLE V GRANTS

5.1 **Amount.** The Authority shall make a Grant each Fiscal Year to the Owner in an amount equal to the Appropriation for that Fiscal Year.

5.2 **Commencement of Grants.** The Authority shall make the first annual Grant on or before July 31, 2017 for the 2017- 2018 Fiscal Year. The first annual Grant shall include the estimated New Tax Revenues for Fiscal Year 2017 – 2018 plus an amount equal to the tax revenues and tax benefits the City receives from the Property or the Project, and any taxes generated by the Project, the Property, or any business located on the Property, for the time period from the issuance of the certificate of occupancy for the Project through June 30, 2017.

5.3 **Date of Grants.** The Authority shall make annual Grants to the Owner on or before July 31 of each year. In the event the Authority has not received the Appropriation from the City to fund the grant by July 31 of each year, the Authority shall make such Grants upon receipt of the Appropriation for such purpose from the City.

5.4 **Use of the Appropriation.** The Authority shall use the Appropriation solely to make Grants to the Owner.

5.5 **Owner's Pledge of Grants.** The Authority and the City acknowledge that the Owner will pledge the Grants as security for the repayment of the Authority Loan and the Conduit Loan.

5.6 **Excess Grant.** In the event the amount of the Grant in a Fiscal Year exceeds the Debt Service, the Owner shall use any such excess amount solely:

5.6.1 First, for any unreimbursed Shortfall.

5.6.2 Second, to prepay the Authority Loan.

5.6.3 Third, to prepay the Conduit Loan.

5.7 **Shortfall.** In the event the Grant in a Fiscal Year is less than the Debt Service, the Owner shall pay the Shortfall needed to pay the Debt Service, subject to the terms of this Agreement.

5.8 **Reconciliation.** The Authority, the City and the Owner shall reconcile the amounts due each year as provided in Section 6.5 below.

5.9 **Final Annual Grant.** The final annual Grant shall include the estimated New Tax Revenues for the time period July 1 through December 31, 2034, unless a lesser amount is needed to pay the remaining amounts due on the Authority Loan, the Conduit Loan, and any unreimbursed Shortfall.

5.10 **Term.** The Authority shall make Grants for the period beginning January 1, 2017 and continuing through December 31, 2034 or until the Authority Loan, the Conduit Loan, and any unreimbursed Shortfall have been paid, whichever is sooner.

ARTICLE VI CITY APPROPRIATIONS TO THE AUTHORITY

6.1 **Budget.** The City shall budget each Fiscal Year for the appropriation of funds to the Authority to allow the Authority to make the Grants to the Owner in accordance with this Agreement. The first Appropriation shall include all amounts to be granted to Owner pursuant to Section 5.2 of this Agreement. Each subsequent year, the City shall budget for the Appropriation in the amount of the New Tax Revenues the City estimates it will receive in the next Fiscal Year.

6.2 **Appropriation.** The City shall make the Appropriation each Fiscal Year to allow the Authority to make the Grants. The City shall make the Appropriation to the Authority by July 31 of each Fiscal Year.

6.3 **Nature of the Obligation of the City.** The City, the Authority and the Owner recognize that the City may not have the power to make a legally enforceable obligation to make the Appropriations beyond the current Fiscal Year. It is the intention of the Council of the City to make sufficient annual appropriations during the term of this Agreement to satisfy the City's obligations under this Agreement.

6.3.1 The City Council hereby directs the City Manager (or other officer charged with responsibility for preparing the City's budget) to include in the budget for each Fiscal Year of the City during the term of this Agreement a request that the Council appropriate the amount of the estimated New Tax Revenues plus any reconciliation adjustments for the next Fiscal Year to the Authority in order to satisfy the City's obligations pursuant to this Agreement. If the Council fails to appropriate the amount of the estimated New Tax Revenues to the Authority before July 31 in each year, the City Manager (or other officer charged with the responsibility of preparing the City's budget) shall:

6.3.1.1 Submit to the Council at its next scheduled meeting, or as promptly as possible, but in any event within 45 days, a request for a supplemental appropriation sufficient to satisfy the City's obligation pursuant to this Agreement; and

6.3.1.2 Give the Owner and the Authority written notice of the Council's failure to appropriate the amount of the estimated New Tax Revenues prior to July 31 in the year in question and give notice to the Owner and the Authority of the request for the supplemental appropriation pursuant to this Section.

6.4 **Appropriation of Funds.** All obligations for funding undertaken by the City or the Authority in connection with the Project or this Agreement are subject to the appropriation of such funds by City Council as may be necessary for such funding.

6.5 **Annual Reconciliation.** The Authority, the City and the Owner shall reconcile the amounts of Appropriations and Grants each year based on the difference between the

estimated New Tax Revenues appropriated to the Authority in each year and the actual New Tax Revenues received by the City in that Fiscal Year.

6.5.1. **Underpayment.** If the amount of estimated Tax Revenues appropriated by the City in a Fiscal Year is less than the actual New Tax Revenues collected in that Fiscal Year, the City shall make an additional Appropriation for the next Fiscal Year in the amount of the underpayment.

6.5.2 **Overpayment.** If the amount of the estimated Tax Revenues appropriated in a Fiscal Year is more than the actual New Tax Revenues collected in that Fiscal Year, the City shall receive a credit against the Appropriation for the next Fiscal Year in the amount of the overpayment.

6.6 **Term.** The City shall make Appropriations for the period beginning January 1, 2017 through December 31, 2034 or until the Authority Loan, the Conduit Loan, and Shortfall have been paid, whichever is sooner.

6.7 **Failure to appropriate.** If the City fails to make an Appropriation to the Authority in accordance with this Agreement in a Fiscal Year, then the City shall make an Appropriation of the amount provided for in accordance with this Agreement in the following fiscal years to reconcile the underpayment.

ARTICLE VII ADDITIONAL OBLIGATIONS OF THE CITY

7.1 **Tax Credits.** The parties acknowledge that rehabilitation, historic and other tax credit financing arrangements are essential to the financing of the Project. The parties will cooperate in structuring the transactions and payments as provided for in this Agreement to allow the realization of rehabilitation, historic and other tax credit financing arrangements.

7.2 **GenWorth Lot.** The parties acknowledge that the Owner's acquisition of the GenWorth Lot is essential to the Project. The parties will cooperate in efforts to allow the Owner to acquire the GenWorth Lot.

7.3 **Street and Utility Improvements.** The parties acknowledge that street and utility improvements planned by the City will affect the Project and that the construction of these improvements after the Project opens will have a negative effect on the Project's operations. The City and the Authority agree to make reasonable efforts to accelerate the completion of the street and utility improvements and/or make provisions that will mitigate the adverse effects of the construction of these improvements on the Project.

7.4 **Two Way Traffic on Seventh Street, Main Street, and Church Street.**

7.4.1 **Seventh Street and Eighth Street.** The City and the Authority will initiate efforts to cause Seventh Street and Eight Street between Main Street and Church

Street to become two-way streets to accommodate access to the Project and to facilitate construction.

7.4.2 **Main Street and Church Street.** The City and the Authority shall explore efforts to cause Main Street and Church Street to be converted to two-way traffic before the opening of the Project.

7.5 **Loading Zones.** The City and the Authority acknowledge that the operation of the Project requires the designation of loading zones in front of the Project on Eighth Street and Church Street to accommodate 150 feet of loading area in front of the Project on Church Street and 120 feet of loading area in front of the Project on Eighth Street. The City and the Authority shall allow a canopy to be constructed over a portion of Eighth Street to provide shelter for loading in inclement weather. The City and the Authority agree to construct streetscape improvements for the entire block around the Project to include sidewalks, curbs, streets, crosswalks at intersections, architectural street lighting and landscaping. The City and the Authority shall arrange for the milling of Church Street to the original grade because the asphalt overlay of Church Street over the years has reduced the height of the curb in front of the Project significantly.

7.6 **Additional Grants.** The City and the Authority may seek additional grant funding available to offset the capital cost of the Project to the Owner and reduce the loan amounts dollar for dollar for amounts received by Owner which reduce its costs. The parties acknowledge that the historic, rehabilitation, and other tax credits sought by the Owner shall not be considered grant funding pursuant to this Agreement.

ARTICLE VIII OWNER'S OBLIGATIONS

8.1 **Development of the Project.** The Owner shall prosecute diligently and continuously the construction of the Project.

8.2 **Conditions Precedent.** The obligations of the Owner to construct the Project shall be subject to the following conditions precedent:

8.2.1 The timely availability of construction financing and permanent financing.

8.2.2 The timely availability of rehabilitation, historic, and other tax credit financing arrangements.

8.2.3 The timely acquisition of the GenWorth Lot.

8.3 **Use of Loan Proceeds.** The Owner shall use the proceeds of the Authority Loan and the Conduit Loan only for the construction and development of the Project and for capital costs of the Project. The Owner shall not use the proceeds of the Authority Loan or the Conduit Loan for the acquisition of the Property.

8.4 **Use of Grant Proceeds.** The Owner shall use the Grants solely to pay the Debt Service and Shortfall.

8.5 **Owner's Payment of Debt Service if Shortfall.** If the amount of the Grant in a Fiscal Year is not sufficient to pay the Debt Service in that Fiscal Year because the estimated or actual New Tax Revenues were in an amount less than the Debt Service, the Owner shall pay the Shortfall in that Fiscal Year.

8.5.1 **Failure of the City to Appropriate Estimated Tax Revenues.** If the City fails to appropriate an amount equal to the estimated New Tax Revenues in a Fiscal Year in accordance with this Agreement, then the Owner shall not be obligated to pay the Debt Service on the Authority Loan in that Fiscal Year.

8.5.2 **Failure of the City to Appropriate Tax Revenue for Reconciliation.** If the City fails to appropriate amounts to allow the reconciliation of prior appropriated estimated New Tax Revenues and/or actual New Tax Revenues for a specific Fiscal Year, then the Owner shall not be obligated to pay the Debt Service on the Authority Loan in the Fiscal Year in which the City fails to appropriate the amounts needed to reconcile the Grants in past Fiscal Years with the Debt Service in past fiscal years and any Shortfall.

8.6 **Pledge of Grants.** The Owner shall pledge the Grants to secure the payment of the Debt Service.

8.7 **Refinancing of First Priority Financing.** Nothing in this Agreement shall restrict the Owner's ability to refinance the principal of the primary construction financing, the primary first priority permanent financing, or the first priority Deed of Trust. If the Owner refinances the first priority permanent financing or the first priority Deed of Trust for the purpose of taking cash out of the Project prior to the repayment of the first priority permanent financing or the first priority Deed of Trust, then the Owner shall repay the Authority Loan and the Conduit Loan in full or the parties will renegotiate this Agreement.

8.8 **Use of Annual Net Positive Cash Flow.** After the Project has been operational for three full calendar years, and for as long as the Authority Note and the Conduit Note are outstanding, the Owner shall deposit and maintain twenty-five percent (25%) of the Annual Net Positive Cash Flow for each year in an escrow account controlled by the Owner. The funds in the escrow account shall be used solely:

8.8.1 First, for any unreimbursed Shortfall.

8.8.2 Second, for public benefit in the immediate area of the Project as agreed to between the City and the Owner.

8.8.3 The funds in the escrow account may be used to pay Debt Service upon the approval of the City and the Owner.

8.8.4 All funds in the escrow account shall be disbursed upon the repayment of the Authority Loan, the Conduit Loan, and any reimbursed Shortfall have been paid, whichever is sooner.

8.9 **Assessed Value.** Owner agrees to not appeal the City's assessed value for a period of Five (5) years after the opening of the hotel as long as the assessed value does not exceed Sixteen Million Dollars (\$16,000,000).

8.10 **New Local Jobs.** Owner will use its good faith efforts to create and maintain at least Eighty (80) new jobs in the City of Lynchburg, which jobs will come from full and part-time positions, both directly and indirectly associated with the Project operations, its vendors and service contractors. Owner agrees to hire Sixty Percent (60%) of its workforce from citizens of the City of Lynchburg to the extent qualified workers are available. Owner agrees to participate in job fairs for new hires in City neighborhoods as reasonably requested by the Authority.

8.11 **Use of Local Contractors.** Owner understands and agrees that in calculating the Authority's return on investment, the use of local contractors from the City of Lynchburg, Virginia shall be considered by Owner. Owner shall use commercially reasonable efforts to use such local contractors if Owner's general contractor determines in its sole discretion that such local contractors are the most qualified to provide services for the Project and at a competitive cost.

8.12 **Appraisal.** Upon receipt, Owner agrees to allow the Authority to review the Appraisal for the Project, which appraisal shall be performed by a MAI certified appraiser.

ARTICLE IX EVENTS OF DEFAULT

9.1 **Events of Defaults.** The occurrence of any of the following events shall constitute an Event of Default under this Agreement:

9.1.1 The Owner shall fail to make any payment when due of principal or interest with respect to the Authority Note or the Conduit Note, or any of them, on the due date thereof, whether at maturity, acceleration or otherwise, provided that, in the Event of Default, Owner shall receive written notice of such Event of Default and the opportunity to cure the same within thirty (30) days after the notice of same is given;

9.1.2 The Owner shall breach or fail to perform any other term, covenant, warranty or agreement herein and such default shall continue for thirty (30) days after written notice thereof has been given to the Owner by the Authority or the City.

9.1.3 The Owner shall (i) voluntarily commence any proceeding or file any petition seeking relief under Title 11 of the United States Code or any other federal, state or foreign bankruptcy, insolvency or similar law, (ii) consent to the institution of, or fail to controvert in a timely and appropriate manner, any such proceeding or the filing of any

such petition, (iii) apply for or consent to the appointment of a receiver, trustee, custodian, sequestrator or similar official for it or for a substantial part of its property, (iv) file an answer admitting the material allegations of a petition filed against it in any such proceeding, (v) make a general assignment for the benefit of creditors, (vi) become unable, admit in writing its inability or fail generally to pay its debts as they become due, or (vii) with respect to the Owner, take partnership action for the purpose of effecting any of the foregoing.

9.1.4 An involuntary proceeding shall be commenced or an involuntary petition shall be filed in a court of competent jurisdiction seeking (i) relief in respect of the Owner or of a substantial part of its property, under Title 11 of the United States Bankruptcy Code or any other federal, state or foreign bankruptcy, insolvency or similar law, (ii) the appointment of a receiver, trustee, custodian, sequestrator or similar official for the Owner or for a substantial part of its property or (iii) the winding-up or liquidation of the Owner and such proceeding or petition shall continue un-dismissed for 60 days or an order or decree approving or ordering any of the foregoing shall continue unstayed and in effect for 30 days.

9.2 **Remedies.**

9.2.1 Upon the occurrence of an Event of Default the Authority may, without notice to the Owner, take either or both of the following actions, at the same or different times: (i) declare the full unpaid principal of and accrued interest on the Authority Note or the Conduit Note and all other obligations of the Owner to be immediately due and payable, whereupon the Authority Note or the Conduit Note and such obligations shall be immediately due and payable, without presentment, demand protest or other obligations formalities of any kind, all of which are hereby expressly waived by the Owner; or (ii) exercise any other rights or remedies available to the Authority under the applicable law.

ARTICLE X ADDITIONAL PROVISIONS

10.1 **Reports to the Authority and City.** During the term of this Agreement, the Owner agrees to report to and provide the Authority and the City on a semi-annual basis, on or before June 30 and December 31 of each year, sufficient information related to the Owner's compliance with the conditions of this Agreement and to provide appropriate documentation to support such compliance. The Owner also agrees to allow the Authority, the City and/or their representatives to inspect, audit, copy, or examine any of the Owner's books, documents, or other relevant material in connection therewith, to the extent necessary to administer this Agreement, upon written request by the Authority or the City. All such documents, information (including electronic data), or access shall be provided or made available within thirty (30) days of a written request from either the Authority or the City at no cost to the Authority or the City. Any information provided to the Authority or the City pursuant to this agreement shall be deemed to be proprietary and confidential information and will be held in confidence by the City and the Authority to extent allowed by Section 2.2-3705.6 of the Code of Virginia.

10.2 **Compliance With the Laws.** The Owner agrees to comply with all applicable federal, state, and local laws, rules, and regulations, including, but not limited to, obtaining a City business license, if applicable.

10.3 **Cooperation.** Each party agrees to cooperate with the others in a reasonable manner to carry out the intent and purpose of this Agreement.

10.4 **Severability.** If any term of this Agreement is found to be void or invalid, such invalidity shall not affect the remaining terms of this Agreement, which shall continue in full force and effect. The parties intend the remaining provisions of this Agreement be enforced to the fullest extent permitted by applicable law.

10.5 **Authority To Sign.** The persons who have executed this Agreement on behalf of the parties represent and warrant they are duly authorized to execute this Agreement on behalf of their respective entity.

10.6 **Counterpart Copies.** This Agreement may be executed in any number of counterpart copies, each of which shall be deemed an original, but all of which together shall constitute a single instrument.

10.7 **Successors.** The terms, conditions, provisions and undertakings of this Agreement shall be binding upon and inure to the benefit of each of the parties and their respective successors and assigns.

10.8 **Assignment.** Owner agrees not to assign or transfer any part of this Agreement without the prior written consent of the City and the Authority, which shall not be unreasonably withheld, and any such assignment shall not relieve Owner from any of its obligations under this Agreement. Owner shall be allowed to assign or transfer rights under this Agreement for the purpose of furthering the development of the Project for financing purposes or for the development of specific portions of the Project, subject to providing the Authority and the City with 30 days written notice of any such assignment and the City's right to object within such 30 day time period and withhold the City's consent which shall not be unreasonably withheld.

10.9 **Responsibility of the Parties.** To the extent permitted by applicable law, each party to this Agreement will be responsible for the actions, inactions, or violations of its officers, employees, and agents in connection with the Project or the Property, and the activities provided for in this Agreement, but nothing contained herein shall be construed as a waiver of the City's sovereign immunity.

10.10 **Forum Selection And Choice Law/Disputes.**

10.10.1 By virtue of entering into this Agreement, Owner agrees and submits itself to the jurisdiction of the Circuit Court of the City of Lynchburg, Virginia, and further agrees this Agreement is controlled by the laws of the Commonwealth of

Virginia, with the exception of Virginia's choice of law provisions which shall not apply; and all claims, disputes, and other matters shall be decided only by such court according to the laws of the Commonwealth of Virginia as aforesaid.

10.10.2 **Disputes.** Prior to the initiation of any litigation, the parties agree to seek to resolve any and all claims, disputes, and other matters utilizing mediation in accordance with the dispute provisions provided in this Section.

10.10.2.1 If a dispute arises out of or relates to this Agreement, or a claimed breach of this Agreement, the parties first to try in good faith to resolve the dispute through negotiation among the parties and by nonbinding mediation. In the event of any such dispute, a party may give the other parties a written description of the dispute and the relief requested. The parties shall promptly attempt to resolve the dispute by negotiation involving senior managers. If the dispute is not promptly resolved by negotiation, any party may demand in writing that all of the parties involved in the dispute participate in a formal mediation presided over by a third-party neutral mediator. If the parties cannot agree on a mediator, then McCammon Mediation Group, 6641 West Broad Street, Richmond, Virginia 23230, or its successor, shall have the power to select the mediator. The parties shall share in the cost of the mediation proceedings equally.

10.10.2.2 If mediation is unsuccessful, the parties shall be free to initiate litigation or take other appropriate action as they deem appropriate. However, no party shall initiate any litigation or action against any other party to this Agreement with respect to the performance or enforcement of this Agreement without first complying with the dispute resolution provisions of this section except for the sole and limited purpose of tolling a statute of limitations or similar laws that would otherwise impair a party's legal rights, or for enforcing this Dispute Section.

10.11 **Nonwaiver.** Each party agrees that any party's waiver or failure to enforce or require performance of any term or condition of this Agreement or any party's waiver of any particular breach of this Agreement by any other party extends to that instance only. Such waiver or failure is not and shall not be a waiver of any of the terms or conditions of this Agreement or a waiver of any other breaches of the Agreement by any party and does not bar the nondefaulting party from requiring the defaulting party to comply with all the terms and conditions of this Agreement and does not bar the nondefaulting party from asserting any and all rights and/or remedies it has or might have against the defaulting party under this Agreement by law.

10.12 **Captions and Headings.** The section captions and headings are for convenience and reference purposes and shall not affect in any way the meaning or interpretation of this Agreement.

10.13 **Easements.** Owner promises and agrees to grant and dedicate to the City all reasonably necessary easements on the Property for the construction of infrastructure improvements needed for or benefiting the Project or surrounding areas, including, but not limited to, storm drainage, sanitary sewers, and/or water, all at no cost to the City.

10.14 **Performance.** If Owner fails to comply with any of the obligations of this Agreement, Owner shall not be entitled to be eligible for and/or receive and/or continue to be eligible for and/or receive any such Grants as referred to above or in this Agreement. In the event the City or the Authority believe that Owner has failed to comply with any of the obligations of this Agreement, except as noted below, the City or the Authority shall give Owner written notice identifying how Owner is not in compliance, with reasonable specificity. Owner shall then have a 30 day period to reasonably cure the identified noncompliance issue. If the identified noncompliance issue cannot reasonably be cured within the 30 day period, Owner shall have an additional reasonable time to cure, not exceeding an additional 60 days, provided Owner acts diligently to accomplish the cure.

10.15 **Notices.** All notices hereunder must be in writing and shall be deemed validly given if sent by certified mail, return receipt requested, or by a nationally recognized overnight courier, addressed as follows (or any other address the party to be notified may have designated to the sender by like notice):

If to City, to:	City of Lynchburg, Virginia Attn: L. Kimball Payne, III, City Manager 900 Church Street, 3 rd Floor Lynchburg, VA 24504 (434) 455-3990 Fax: (434) 847-1536
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With a copy to:	City of Lynchburg, Virginia Attn: Walter C. Erwin, III, City Attorney 900 Church Street, 3 rd Floor Lynchburg, VA 24504 (434) 455-3973 Fax: (434) 847-2067
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If to Authority, to:	H. Michael Lucado, Chair Lynchburg Economic Development Authority 900 Church Street Lynchburg, VA 24504 (434) 455-4490
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With a copy to: Theodore J. Craddock, Esquire
Caskie & Frost, P.C.
2306 Atherholt Road
Lynchburg, VA 24501
(434) 846-2731

If to Owner, to: Blair Godsey
Virginian Hotel, LLC
101 Mountain Avenue
Roanoke, VA 24016

With a copy to: G. Franklin Flippin, Esq.
Gentry Locke
800 SunTrust Plaza
10 Franklin Road, S.E.
P.O. Box 40013
Roanoke, VA 24022-0013
Fax No. 540-983-9400

Notice shall be deemed delivered upon the date of personal service, two days after deposit in the United States mail, or the day after delivery to a nationally recognized overnight courier.

10.16 **Force Majeure**. A delay in or failure of performance by any party shall not constitute a default, nor shall Owner, the City or Authority be held liable for loss or damage, or be in breach of this Agreement, if and to the extent that such delay, failure, loss or damage is caused by an occurrence beyond the reasonable control of such party and its agents, employees, contractors, subcontractors and consultants, which results from Acts of God or the public enemy, compliance with any order of or request of any governmental authority or person authorized to act therefore, acts of declared or undeclared war, public disorders, rebellion, sabotage, revolution, earthquake, floods, riots, strikes, labor or employment difficulties, delays in transportation, inability of party to obtain necessary materials or equipment or permits due to existing or future laws, rules, or regulations of governmental authorities or any other causes, whether direct or indirect, and which by the exercise of reasonable diligence said party is unable to prevent. For purposes of this Agreement any one delay caused by any such occurrence shall not be deemed to last longer than 6 months and all delays caused by any and all such occurrences under any circumstances shall not be deemed to last longer than a total of 9 months. Any party claiming a force majeure occurrence shall give the other parties written notice of the same within 30 days after the date such claiming party learns of or reasonably should have known of such occurrence, or any such claim of force majeure shall be deemed waived. Notwithstanding anything else set forth above, after a total of 9 months of delays or failure of performance of any type have been claimed by a party as being subject to force majeure, no further delays or claims of any type shall be claimed by such party as being subject to force majeure and/or being an excusable delay.

10.17 **Entire Agreement**. This Agreement, together with any exhibits, attachments, and referenced items, constitutes the entire agreement of the parties and supersedes all prior agreements between the parties. No amendment to this Agreement shall be valid unless made in writing and signed by the appropriate parties.

(SIGNATURE PAGE TO FOLLOW)

IN WITNESS WHEREOF, the parties have executed this Agreement by their authorized representatives.

CITY OF LYNCHBURG, VIRGINIA

By: _____

_____, City Manager

ECONOMIC DEVELOPMENT
AUTHORITY OF THE CITY OF
LYNCHBURG, VIRGINIA

By: _____

_____, Chair

VIRGINIAN HOTEL, LLC

By: _____

Its: Manager